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NO. 382

In the Supreme Court of the United States

OCTOBER TERM, 1956

OTTO W. CAHILL,
Petitioner,

-vs-

STATE OF OREGON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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The question presented by petitioner for decision, as stated by him, (Pet. for Cert., p. 2) is:

> ". . . whether or not Article VII, Sec. 3 of the Constitution of Oregon is unconstitutional as repugnant to the procedural requirements of the due process clause of the Fourteenth Amendment of the Constitution of the United States."

The precise manner in which the Oregon Constitutional provision is alleged to infringe the due process clause is stated at page 9 of the Petition, as follows:

> "The Oregon Supreme Court violated due process and the guarantee of equal protection of the laws by arbitrarily invoking Article VII, Sec. 3, Oregon Constitution, to uphold appellant's conviction upon a different theory than that which he was tried in the court below."

It is not the intention of respondent to argue either the accuracy of petitioner's interpretation of the decision of the Oregon Supreme Court, or the merits of the alleged constitutional issue asserted. Such an argument does not appear to be necessary, since it is apparent from the face of the record that petitioner is attempting to raise in this Court a question never presented for decision to the court below.

B. The Constitutional Issue Asserted in the Oregon Supreme Court.

Since the asserted constitutional issue did not arise until the initial decision of the court below, the only manner in which the question could have been presented was by petition for rehearing. As the record shows, a petition for rehearing was filed, but the only federal

constitutional issue therein asserted was wholly different from the question now presented to this Court.

Petitioner tacitly admits that the issue was never raised in the state court, by the statement appearing at page 8 of his petition, as follows:

> "Federal error occurred in the first instance in the Supreme Court of the State of Oregon when said Court invoked Article VII, Sec. 3, of the Oregon Constitution, as above described, thus violating procedural due process and denying appellant equal protection of the laws. The issue of Federal error is timely raised in this petition when said error occurred in the first instance in the State Court of Last Resort. (See Cole vs. Arkansas, 333 U.S. 196, 92 L. Ed. 644; Saunders vs. Shaw, 244 U.S. 317, 61 L. Ed. 1163, 37 S. Ct. 638; Herndon vs. Georgia, 295 U.S. 44., 79 L. Ed. 1530, 55 S. Ct. 794."

He is correct when he states that the issue of Federal error is raised in this petition; he is in error when he states that it is timely. The cases cited will be hereinafter discussed, to show that in each of them the question presented to the Supreme Court was raised in the state court. Before discussing that subject, however, respondent desires conclusively to demonstrate that the issue here sought to be raised has never been presented to the Supreme Court of Oregon.

The Rules of the Supreme Court of the State of Oregon provide for petitions for rehearing. 203 Or. 734-735, Rule 51. Such a petition was filed in this case, and is reproduced as Appendix A of this Brief, at page 13. Reference to this Petition shows that the only Constitutional question thereby presented to the Supreme Court of Oregon was "Error No. 8" (p. 17 hereof), as follows:

> "The Court erred in holding, in effect, that the provision of Article VII, § 3 of the Constitution of Oregon authorizing 'affirmance notwithstanding error' permits the Supreme Court to disregard errors of the trial court improperly admitting material or possibly prejudicial evidence and authorizing the Court to exercise its own judgment and beliefs as to how the case should have been decided in the trial court; and the Court erred in failing to hold that to place such a construction, or interpretation upon said provision of our State Constitution renders that provision of our State Constitution (as now construed by our Supreme Court in this and some former decisions) VOID, as in contravention of the SIXTH AMENDMENT of the Constitution of the United States."

It is clear from the foregoing that the only Constitutional issue raised in the state court was the claimed denial of the Sixth Amendment guarantee of the right to trial by jury. The Fourteenth Amendment was not mentioned, and, perhaps more significant, the proposition was not asserted that affirming a case on a different theory from that on which it was tried is a violation of the due process clause.

Lest there be any doubt whatsoever of the question raised in the court below, we have caused Appellant's Brief on Petition for Rehearing in the Oregon Supreme Court to be certified to this Court as a part of the record, and in Appendix B, at page 18 hereof, we have reproduced the entire discussion under Point No. 3 of that Brief. Point No. 3 was the only point raising a constitutional issue, and, as stated by petitioner at page 2 of his Brief on Petition for Rehearing, was:

"3. Does the disposal of this case, as disposed of by the Majority Opinion, deprive the defendant of the 'trial by jury' guaranteed by the Constitution of the United States?"

Examination of Appendix B confirms that the only constitutional question argued in the court below was whether the majority opinion in this case deprived the petitioner of his "right" to trial by jury under the Sixth Amendment.

C. The Issue Raised by the Petition is Not the Same as the Issue Asserted Below.

It needs little argument to demonstrate that the issue of denial of a jury trial under the Sixth Amendment is not the same thing as deprivation of due process of law under the Fourteenth Amendment, by affirming the case on a different theory from that on which it was tried. Even if the Petition for Rehearing be interpreted liberally, and construed so as to raise the question of deprivation of due process under the Fourteenth Amendment by denial of a jury trial, there is a vast difference between the two issues, even though they arise under the same constitutional provision.

As already mentioned, petitioner tacitly admits, by his statement on page 8 of his petition, as well as by his failure to comply with Rule 23(f) of the Rules of this Court, that he is presenting an issue different from any that was ever presented to the Oregon Court. Moreover, he expressly distinguishes the question now sought to be raised from the only constitutional issue raised below, in his discussion (Pet. for Cert., p. 15) of the case of

State v. Burke, 126 Or. 651, 269 Pac. 869, 270 Pac. 756, appeal dismissed, *Burke v. Oregon,* 279 U.S. 811, 49 S. Ct. 262, 73 L. Ed. 971. In that case, the appeal was dismissed on the ground that the federal question presented was frivolous. Petitioner suggests that the federal question there presented was the constitutionality of Article VII, Sec. 3 of the Oregon Constitution with reference to a denial of trial by jury—the precise issue raised by the petitioner herein on petition for rehearing. Whether or not that was the question sought to be raised in the *Burke* case, petitioner's discussion of the matter demonstrates that it is a different question which he is now raising.

The proper rule to be applied in this situation was laid down by the court in the case of *Wilson v. Cook,* 327 U.S. 474, 483-484, 66 S. Ct. 663, 668, 90 L. Ed. 793. The Court said:

> "But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now sought to be presented is in some measure related to that decided by the state court, and, like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely 'an enlargement' of an argument made before the state court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare *Dewey v. Des Moines,* 173 U.S. 193, 197, 198. We are therefore not free to consider it.
>
> " 'In reviewing the judgment of a State Court, this Court will not pass upon any federal question not shown by the record to have been raised in the

state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented'. *New York ex rel. Cohn v. Graves,* 300 U.S. 308, 317, and cases cited. For, as we said in *McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434-435, 'In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard to the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for this reason that this Court, where the constitutionality of the statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.' "

D. This Court is Without Jurisdiction to Grant This Petition.

Jurisdiction is invoked in this petition under 28 U.S.C.A. § 1257(3) (Pet. for Cert., p. 2). That statute, as a prerequisite to jurisdiction in this Court, requires that the validity of a state statute be "drawn in question" or a constitutional right "specially set up or claimed." If the constitutional issue is not raised in the state court, the Supreme Court is without jurisdiction to consider it. As it was stated in *C.I.O. v. McAdory,* 325 U.S. 472, 477, 65 S. Ct. 1395, 1398, 89 L. Ed. 1741:

"Since the State Supreme Court did not pass on the question now urged, and since it does not appear to

> have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance. Caperton v. Bowyer, 14 Wall. 216, 236, 20 L. Ed. 882; Hulbert v. City of Chicago, 202 U.S. 275, 280, 281, 26 S. Ct. 617, 618, 50 L. Ed. 1026; Dorrance v. Commonwealth of Pennsylvania, 287 U.S. 660, 53 S. Ct. 222, 77 L. Ed. 570; Chandler v. Manifold, 290 U.S. 665, 54 S. Ct. 93, 78 L. Ed. 575; see also Flournoy v. Weiner, 321 U.S. 253, 64 S. Ct. 548, 88 L. Ed. 708; Charleston Fed. Sav. & Loan Assoc. v. Alderson, 324 U.S. 182, 65 S. Ct. 624, 627, and cases cited."

In fairness to petitioner, it should be noted that he has not contended that the question he now raises was ever presented to the Oregon Supreme Court. His position is as follows (Pet. for Cert., p. 8):

> "The issue of Federal error is timely raised in this petition when said error occurred in the first instance in the State Court of Last Resort."

In support of this statement, he cites three cases. In none of them was the federal constitutional issue raised for the first time in the Supreme Court.

In *Cole v. Arkansas,* 333 U.S. 196, 200, 68 S. Ct. 514, 516, 92 L. Ed. 644, this Court, speaking of the State Supreme Court, said:

> "It later denied a petition for rehearing in which petitioners argued: 'To sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass upon, deprives the defendants of a fair trial and a trial by jury, and denies the defendants that due process of law guaranteed by the 14th Amendment to the United States Constitution.' "

Thus, there was clearly and expressly presented to the state court the issue of whether its decision, by sustaining a conviction on grounds not charged in the information, violated the right of defendants to due process of law.

In *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163, the constitutional issue first arose in the state court's decision of a petition for rehearing. The court dismissed a second petition for rehearing upon the basis of a state rule forbidding more than one petition. Before the dismissal, however, it was pointed out to the court that a new question had been raised by its previous decision. The Supreme Court said (244 U.S. at p. 320):

> "It appears that shortly before the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

It is easy to see what more petitioner here could have done. He could have raised the constitutional issue in his petition for rehearing.

In *Herndon v. Georgia*, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, the constitutional issue was first raised on petition for rehearing and the majority of the Supreme Court refused to hear the case, holding that the issue should have been anticipated by reason of prior decisions of the state court. Justice Cardozo, joined by Justices Brandeis and Stone, dissented, upon the ground that the question had been timely raised by petition for rehearing, saying (295 U.S. at p. 447):

> "The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. (Citing cases.)"

Certainly this case cannot be said to be authority for the proposition that a litigant may file a petition for rehearing ignoring the constitutional issue, and then raise it for the first time by petition for writ of certiorari in this Court.

As the Court said in *Williams v. Kaiser*, 323 U.S. 471, 477, 65 S. Ct. 363, 367, 89 L. Ed. 398:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the case. (Citing cases)".

CONCLUSION

Respondent contends that there is nothing involved in this case but a question of state practice. If, however, there be a federal constitutional issue of substance, the highest court of the state should have an opportunity to pass upon that issue, and to determine in the first instance the constitutionality of its interpretation of a provision of the state constitution which has been in effect for more than forty years. The constitutional issue sought to be raised here has never been presented to the

lower court for decision. Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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